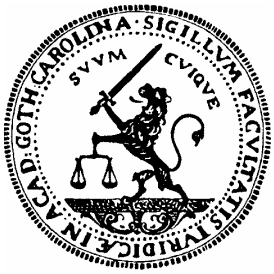

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A Question of Definition
- The Concept of Internal Armed Conflicts in the Swedish Aliens' Act

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Contents

Summary

Fleeing the horrors of an internal armed conflict constitutes a ground for subsidiary protection in the Swedish Aliens' Act. However, what is to be defined as such a conflict is disputed, which is obvious from the divergent views on the ongoing situation in Iraq. In 2007 the Migration Court of Appeal established the situation as severe, but as not amounting to an armed conflict. This conclusion met strong resistance from NGOs as well as from the academia.

By applying three different perspectives, the aim of this thesis is to provide the reader with insight in how and why the interpretation of internal armed conflicts as presented by the Court, can be criticized. The main hypothesis to be proven is that the interpretation is incoherent and inadequate.

The first perspective entails a formal legal approach, establishing *lex lata*. Since the Swedish Aliens' Act bases its interpretation of internal armed conflicts on international humanitarian law, the examination comprises instruments and case- law of both international humanitarian law and migration law. Also relevant EU- law is taken into account. From this examination it becomes clear that the legal sources of international humanitarian law and migration law both fail to coherently determine what is to be defined as an internal armed conflict.

In a second, historical, perspective the reasons of this incoherency is sought. Firstly by taking a look at the historical legal regulation of internal conflicts and its development in international humanitarian law, and relating this with the application of subsidiary protection in migration law. Secondly, by examining the changing nature of conflicts over time and comparing this reality with the legal concepts. This brief historical survey shows that the conception of internal conflicts has changed only insignificantly since the 18th century. The regime of recognition of belligerency used then was based on the same considerations as do the application of subsidiary protection. The static legal concept of armed conflicts is identified as problematic since the characteristics of internal conflicts have changed rather radically after the end of Second World War. Thus is seems like the law bases itself on an anachronic perception of the nature conflicts.

In a third perspective, an alternative interpretation is sought in the field of peace- and conflict research. A definition as provided by Uppsala University, entailing a numerical variable as a decisive requisite, is presented and analyzed. The definition is dismissed, but the assessment strengthens the overall conclusion in the thesis: that any concept of armed conflicts entailing too formal criteria is deceiving and not suitable within the context of migration law.

Sammanfattning

Att fly en intern väpnad konflikt utgör grund för subsidiärt skydd i den svenska utlänningslagen. Emellertid är det oklart vad som utgör en sådan konflikt, vilket är tydligt från de olika uppfattningarna om situationen i Irak. Migrationsöverdomstolen fastställde 2007 att situationen i landet är svår, men att det inte pågår vad som kan anses som en väpnad konflikt. Domslutet mötte stark kritik från flera människorättsorganisationer och från freds- och konfliktsexperter. Genom att utgå från tre olika perspektiv, är syftet med detta examensarbete att kunna erbjuda läsaren insikt om hur och varför Migrationsöverdomstolens tolkning av begreppet intern väpnad konflikt kan kritiseras. Uppsatsen huvudsakliga hypotes är att tolkningen är både inkoherent och inadekvat.

Det första perspektivet utgår från rättsdogmatisk metod för att fastställa gällande rätt. Eftersom den svenska utlänningslagen baserar sin tolkning av begreppet intern väpnad konflikt på hur konceptet används i internationell humanitärrätt, så innefattar undersökningen rättskällor från både humanitärrätten och migrationsrätten. Analysen av gällande rätt visar att det inte finns någon koherent definition av vad som utgör en intern väpnad konflik, varken i humanitärrätten eller i svensk utlänningsrätt.

I ett historiskt perspektiv söks orsakerna till denna inkoherens. Dels genom en undersökning av den historiska rättsliga regleringen samt utvecklingen av interna väpnade konflikter i internationell humanitärrätt. Dels genom att studera förändringar i konflikters natur under de senaste århundradena och relatera detta till de rättsliga koncepten. Den historiska översikten visar att begreppet intern väpnad konflikt endast förändrats obetydligt alltsedan 1700- talet. Doktrinen om ‘erkännande av stridande part’[1] som var dåtidens rättsliga reglering, bär stora likheter med staters tillämpning av subsidiärt skydd, genom att diplomatiska hänsyn styr . Det konstateras vidare att det statiska rättsliga konceptet av hur väpnade konflikter ser ut rimmar illa med verkligheten. Alltsedan slutet av andra världskriget har konflikter utkämpade runt om i världen förändrats radikalt i karaktär. Detta innebär att lagen verkar utgå från en anakronistisk uppfattning om vad som utgör en konflikt.

I det tredje och sista perspektivet undersöks en alternativ tolkning av väpnade konflikter hämtad från freds- och konfliktforskningen. En akademisk definition med en numerär variabel som främsta avgörande kriterium, analyseras utifrån en migrationsrättslig kontext. Definitionen avfärdas som en olämplig rättslig lösning, men slutsatserna om den stärker det huvudsakliga argumentet i uppsatsen: att samtliga definitioner av väpnade konflikter som bygger på alltför formella kriterier ter sig olämpliga i en migrationsrättslig kontext.

[1] På engelska: recognition of belligerency

Preface

väggarna dörrarna låsen
det uråldriga hantverket
all tid som gått åt
all skicklighet som lagts ned
på att skydda oss från varandra
Bruno K. Öijer

Thank you Professor Gregor Noll for supervising and guiding my work with this thesis. But most of all thank you for inspiration and possibilities given within the field of migration law; I now know how to make use of my law degree.

In addition, thank you with great love to my family and especially to Hannes; truly my safe haven in the world.

Abbreviations

The 1949 Geneva Conventions	Conventions I-IV adopted at Geneva, 12 August 1949
Common article 3 or article 3	Article 3 common to the 1949 Geneva Conventions
EU	European Union
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
NGO	Non- Governmental Organisation
The Protocol or Protocol II	Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the protection of Victims of Non- International Armed Conflicts of 8 June, 1977
UCDP	Uppsala Conflict Data Project
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

"Sweden, a European haven for Iraqi refugees, starts shutting the door"[2]

This headline was to be found in the International Herald Tribune in July 2007, following decisions of the Swedish Migration Board to deny protection to asylum seekers from southern and central Iraq. These decisions marked a shift in the Swedish policy towards Iraqi asylum seekers. From previously granting protection because of the general turmoil in Iraq, the Board now altered to requiring an individual threat or harassment because of the ongoing conflict. This shift was based on three preceding judgements of the Migration Court of Appeal in 2007, clarifying the status of the situation in Iraq. In these cases, the Court concluded the situation of Iraq to be severe, however falling short as an internal armed conflict in the meaning of international law and chapter 4 section 2 of the Alien's Act[3].

Migration Board Director, Dan Eliasson, said that the court's "interpretation of the migration law, which guides us, means that the general situation [in Iraq] does not automatically lead to asylum, but the applicant must cite individual reasons. /.../ The consequence will probably be that fewer asylum seekers will be granted asylum in Sweden"[4]

Critics have regarded this 'reinterpretation' of the Aliens' Act as an answer to the disproportionate number of Iraqis granted protection in Sweden, in comparison with the rest of the Europe. More than a third of the total number of Iraqis seeking asylum in Europe in 2006 and the first quarters of 2007, have been granted protection in Sweden.[5] Concerns have been raised on the ability of the Swedish welfare system to manage this influx of people.[6]

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[2] The Associated Press, 'Sweden, a European Haven for Iraqi Refugees, Starts Shutting the Door', *The International Herald Tribune*, 6 July 2007 (available at <www.iht.com/articles/ap/2007/07/06/europe/EU-GEN-Sweden-Iraqi-Refugees.php> visited on 2008-01-28)

[3] Utlänningslag (Aliens' Act) SFS 2005:716

[4] The Associated Press, 'Sweden, a European Haven for Iraqi Refugees, Starts Shutting the Door', *The International Herald Tribune*, 6 July 2007 (available at <www.iht.com/articles/ap/2007/07/06/europe/EU-GEN-Sweden-Iraqi-Refugees.php> visited on 2008-01-28)

[5] In 2006 about 19 400 persons from Iraq applied for asylum in European countries, of which about 9000 were granted protection in Sweden. Between January and June 2007, about 19 200 sought asylum, of which 4 800 have been recognized protection in Sweden. *See* UNHCR, *Asylum levels and trends in industrialized countries 2006*, 23 March 2006 pp. 14 and 16 (available at <www.unhcr.org/statistics/STATISTICS/460150272.pdf>, visited on 2008-01-28); UNHCR *Asylum levels and trends in industrialized countries second quarter 2007*, 21 September 2007, pp. 13 and 19, (available at <www.unhcr.org/statistics/ STATISTICS/46f0e0dd2.pdf>, visited on 2008-01-28)

[6] The Associated Press, 'Sweden, a European Haven for Iraqi Refugees, Starts Shutting the Door', *The International Herald Tribune*, 6 July 2007 (available at <www.iht.com/articles/ap/2007/07/06/europe/EU-GEN-Sweden-Iraqi-Refugees.php> visited on 2008-01-28)

The authorities' assessment of the Iraqi conflict has met strong resistance from NGOs. Christer Zettergren, head of the Swedish Red Cross, has stated: "It's an absurd decision/.../ Of course there is an internal armed conflict. If these are the consequences, and the court says this is the law /.../then we have to change the law."[7] Also experts within in the field of peace- and conflict research have found the decision unreasonable. Professor Peter Wallensteen concludes: "The law must correspond to a correct description of the reality. We cannot have a description of the reality that the general public, the researchers and the experts do not agree on".[8]

The critique of the recent decisions on Iraqi asylum seekers touches upon interesting issues. Apparently, there are divergent views on how to define the conflict. So what then is the law; what is 'an internal armed conflict'? And if, as both Zettergren and Wallensteen are suggesting, the current concept is not satisfying, why is that so?

1.1 Subject and Purpose

Taken from the facts outlined above, my hypothesis is that the concept of internal armed conflicts in Swedish migration law is incoherent and inadequate in some way. The aim of this thesis is to examine if this is true, and furthermore to look for explanations and alternatives. Since the Migration Court of Appeal bases its interpretation on international law, or more exactly on international humanitarian law (IHL)[9], the term internal armed conflict will be examined in migration law and IHL collaterally. Furthermore, in order to grasp the fully context of the concept, I will approach the concept from three different perspectives.

The first perspective is one of *lex lata*, entailing a formal legal review of relevant sources of law. The aim is to identify problems with the definition of internal armed conflicts as it stands today, in migration law as well in IHL.

The second perspective is historical. In order to explain a phenomenon one often needs to look in the rear- mirror. Thus, I will examine the historical development of regulation of internal conflicts in IHL, and relate this to *lex lata* of migration law. Furthermore, I will take a look at the reality of the concept: the conflicts as such. I will briefly examine their development from the birth of the modern state in the 17th century up to today's conflict in Iraq.

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[7] A. Cox, 'INTERVIEW-Swedish Minister Insists Iraqi Asylum Policy Fair', *Reuters,* 10 July 2007 (available at <www.reuters.com/article/latestCrisis/idUSL09885483>, visited on 2008-01-28)

[8] O. Wijnbladh, 'Irak Är "Det Värsta Kriget i Världen"', *Dagens Nyheter*, 13 July 2007 (available at <www.dn.se/DNet/jsp/polopoly.jsp?d=147&a=670536>, visited on 2008-01-28)

[9] This is obvious from the preparatory works and the case- law concerning protection on the ground of internal armed conflicts. *See further* in chapter 3.4.

My third perspective aims at finding an alternative interpretation of armed conflicts, and this will be accomplished by recourse to another discipline: peace- and conflict research. Analysing a definition as provided by the Uppsala Data Conflict Project (UCDP), I will assess whether this could be a suitable legal solution.

Seemingly, my approach in this thesis is fairly ambitious. However, my purpose is not to provide for in depth- analyses of each and every perspective. Rather, the aim is to be able to provide the reader with insight in how and why the Court's interpretation of internal armed conflicts can be criticized in a number of ways. The core of the thesis is not so much the conclusions *per se*, but the 'new' way(s) suggested in approaching the issue.

1.2 Method and Materials

In conducting this thesis I hold a comparative approach comprising three different perspectives. Thus, I make use of various methods and materials, depending on the issue at hand. The perspective *de lege lata* will be examined and analysed using traditional legal method[10]. Relevant sources of law comprise three levels: international law, EU- law and Swedish law. Since this is a rather ambitious task, I have limited the material to a great extent. Concerning the examination of international treaties, I only take into account instruments comprising or touching upon customary law. As regards the study of relevant case- law I have only considered cases of precedent value.[11]

Since I am neither a legal historian nor an expert within the field of peace- and conflict research, my descriptions from these perspectives are rather modest. I have mainly relied on the works of acknowledged authors within respective field. I look through the glasses of a judicial scholar, thus the conclusions are somewhat nearsighted, in spite of the multidisciplinary approach. However, the aim is not to present an exhaustive historical perspective, or one of peace- and conflict research, but to identify patterns and relate them with migration law. From this point of view, I have concluded the method of so called desk research to be satisfactory.

[10] Review comprising laws, legal documents, customs, general principles, judicial decisions and doctrine. *Cf*. article 38 of the Statute of the International Court of Justice concluded at San Francisco, on 26 of June 1945

[11] As regards the international case- law the cases have been selected after conferring doctrine. As to Swedish case- law, I have limited my self to cases decided by the Government (according to the former decision procedure in alien issues) and the Migration Court of Appeal.

1.3 Delimitations

The term internal armed conflicts exists in several different fields of law. This thesis is mainly limited to Swedish migration law. The description of international law and EU- law is thus strictly limited to the concept of armed conflicts, disregarding the application of any rules associated with the definition.

I will focus only on *internal* armed conflicts and the lower threshold of the concept. Thus, the distinction between internal and international or even internationalized internal conflicts will mainly be left out. The reason for this is that the upper threshold for internal conflicts is irrelevant for the aim of this thesis, since the Swedish Aliens' Act covers both internal and international conflicts.

Overall, in my examination *de lege lata* I will focus restrictively on how armed conflicts are defined. I will not go into detail of the rather complex requisites that the concerned provisions comprise, unless it is necessary to fulfil my aim. As regards article 15(c) of the Qualification Directive[12], I will not go into any detail of the requirement of individualization of the threat[13]. Neither, will I examine the concept of 'other grave conflicts', that is the second passage of chapter 4 section 2 of the Aliens Act. One could argue that whatever gap of protection a restrictive approach towards internal armed conflict would create, this would be consumed by the ground 'other grave conflicts'. Thus, dwelling on the concept of internal armed conflicts would seem superfluous. I however, do not find this conclusion convincing. If this was the case, then the first passage of chapter 4 section 2 of the Aliens Act would serve no purpose. But foremost, such a conclusion disregard the utterly importance between passage one and two: the latter clearly requires a higher degree of individualization.[14]

In the historical perspective, it is not possible to give any exhaustive or profound description of this within the frames of this thesis. Thus, I have limited myself to clearly distinguishable patterns and key events, as identified and analysed in relevant doctrine.

As regards the examination of an alternative interpretation of internal armed conflicts, I only look at the definition as laid down by UCDP. There are several definitions to choose from in the field of peace- and conflict re-

[12] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted**,** Official Journal L 304 of 30 September 2004 pp.12 -23 [hereinafter the Qualification Directive]

[13] For an excellent overview of this, please *see* J. McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime', *International Journal of Refugee Law*, (2005) Vol. 17 No. 3, pp. 461- 516

[14] *See* Government Proposal *Ny Instans- och Processordning i Utlännings- och Medborgarskapsärenden,* Prop. 2004/05:170, 26 May 2005 (available at <www.regeringen.se/sb/d/108/a/45568>, visited on 2008-01-28)*,* at p. 274

search. But since the temporal and spatial frame for this thesis do not allow a more comprehensive presentation of different definitions, I have decided to go into more depth of just one. I have chosen the definition of UCDP, since this is the most well- established project, covering conflicts up to this date and the one frequently used in academic research.

1.4 Outline

In order to keep the line of arguments as accessible as possible and above all to keep the reading interesting, I have found it necessary to divide the thesis into distinguishable parts, representing each of the perspectives outlined above. Every part consists of a descriptive presentation of the relevant perspective, with following conclusions.

Firstly, I will give a very brief background of IHL and migration law. Thereafter follows an examination of *lex lata*, comprising international humanitarian law, and migration law on a European and Swedish domestic level. This chapter is the most comprehensive and dense one, since it founds the base of the rest of the thesis. In subsequent chapters 4 and 5 the historical context and development of internal conflicts will be dealt with: the history of international regulation of internal conflicts in IHL is studied and related to the concept(s) of today in migration law. In chapter 5, the challenge posed by new kinds of conflicts is presented and discussed in relation to *lex lata*. Finally, in chapter 6, an alternative interpretation of internal armed conflicts as presented by peace- and conflict research, is examined. The conclusions of precedent chapters are summarized and interrelated in chapter 7, followed by final remarks in chapter 8.

A comment on the terminology used is necessary. The proper name of the ground of protection due to internal armed conflict enshrined in chapter 4 section 2 of the Aliens' Act, is currently 'a person otherwise in need of protection'. This is suggested to be altered to 'alternative protection' when transposing the Qualification Directive. I, however, will consequently use the term of the Qualification Directive: subsidiary protection. This term can entail different grounds for protection. However as used in this thesis it is to be understood as the protection given to persons fleeing an internal or international conflict.

2 Background

According to the International Committee of the Red Cross (ICRC) about 80 per cent of all victims of armed conflicts since the end of Second World War have been victims of internal armed conflicts.[15] The concept of internal armed conflicts has consequently gained in importance in international law during the last decades. From being a field regarded as exclusively within the domestic affairs of states, internal armed conflicts have successively found its way into the scope of international regulation. IHL is the main scene where the concept is performing, but it is also existent in several other international treaties and conventions[16]. Furthermore, during the last decade it has been recognized in migration laws and policies of many European states, under the regime of subsidiary protection. IHL and migration law are intertwined, since armed conflicts logically forces or triggers people to leave their country. However, as legal fields, the two of them are clearly historically and contextually distinct categories of international law.

2.1 What is International Humanitarian Law?

Historically, the relation between states has been the focus of international law. Thus, *ius in bello* and IHL originally was developed in a context of inter- state conflicts. Conflicts within the territory of a state were considered to fall in the scope of the principle of absolute sovereignty over domestic affairs.[17] However, towards the end of the 19th century internal armed conflicts gained interest as an international issue, due to recent horrors of such conflicts. The ICRC played a central role in influencing international law to entail also victims of internal armed conflicts, and their work of codifying the laws of war has had a tremendous impact on the evolution of IHL.[18] Common article 3 of the 1949 Geneva Conventions[19] imposed minimal humanitarian considerations in non- international conflicts. But it was first in

[15] ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Introduction.*, <www.icrc.org/ihl.nsf/INTRO/475>, visited on 2008-01-28

[16] For example in article 8 (2)(d) of the Rome Statue of the International Criminal Court of 17 July 1998, A/CONF.183/9. The term 'internal conflicts' is furthermore a ground of protection in Central America, according to III(3) of the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted on 22 November 1984. As for the Organization of African Unity, article 1(2) of the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa, mentions "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality" as a ground of protection.

[17] L. Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002), pp. 2-3

[18] *Ibid.*, p. 21

[19] Geneva Conventions I, II, III and IV, adopted at Geneva, 12 of August 1949, 75 U.N.T.S, p. 31; p. 58; p. 135; and p. 287

1977 by the adoption of Additional Protocol II[20], that non- international conflicts clearly became in the ambit of international law.

Contemporary IHL is a complex legal sphere of various conventions and rules of customary law, pertaining both to international and internal armed conflicts. One could wonder why internal armed conflicts are regulated on an international level at all, since they concern the domestic affairs of a state. There are of course several reasons for this, but mainly it is due to the fact that these conflicts tend to affect international peace and security when creating refugee flows or intruding on interests of third states. Furthermore, it is a consequence of the progressive development of human rights, conferring rights to individuals under international law. [21]

2.2 What is Migration Law?

Migration law is a diversified legal space. On an international level it is characterized by the principle of state sovereignty at one flank, and by competing humanitarian principles on the other.[22] Furthermore, it on one hand governs the relation between states[23] and on other hand how states themselves are supposed to treat those seeking protection[24]. Protection of those fleeing armed conflicts or persecution is thereby regulated on an international, regional as well as on a national level.[25]

Fleeing armed conflicts, civil wars or situations of generalized violence is recognized in international refugee law[26] only if amounts to individualized persecution. The UNCHR Handbook[27] states that persons fleeing international or national armed conflicts are normally not considered as refugees, and highlights the fact that a well founded fear of persecution must be estab-

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[20] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted at Geneva, 8 June 1977, 1125 U.N.T.S., p. 609

[21] 'Civil Conflicts in Modern International Relations' in Evan Luard (ed.), *The International Regulation of Civil Wars,* (London: Thames and Hudson, 1972), pp 7-25 at p. 20; L. Moir, *The Law of Internal Armed Conflict* (2002), p. 2

[22] G.S Goodwin- Gill & J. McAdam, *The Refugee in International Law*, (Oxford: Oxford University Press, 3rd edition 2007), pp. 1- 3

[23] As an example, state practice suggests a general principle of duty to not create refugee flows and duty of cooperation if such flows arise. *See generally* G.S Goodwin- Gill & J. McAdam, *The Refugee in International Law* (2007), pp. 1-5

[24] Eg. the principle of non- refoulement. *See generally* G.S Goodwin- Gill & J. McAdam, *The Refugee in International Law* (2007), pp. 1-5

[25] G.S Goodwin- Gill & J. McAdam, *The Refugee in International Law* (2007), p. 7

[26] Convention Relating to the Status of Refugees, adopted at Geneva on July 28, 1951, 189 U.N.T.S., p. 150 [hereinafter the Refugee Convention]; and Protocol Relating to the Status of Refugees, adopted at New York on January 31, 1967, 606 U.N.T.S., p. 267

[27] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992. Online. UNHCR Refworld, available at <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3314>, visited on 2008-01-28 [hereinafter UNCHR Handbook]

lished in every individual case.[28] Considering this lack of protection in international refugee law, the term of internal armed conflicts instead has found its way into the definition of subsidiary protection within EU- law and in several domestic legal systems. Subsidiary protection entails legal status of persons who do not achieve refugee status, but nonetheless are regarded as in need of protection due to eg. armed conflict, risk of torture or death penalty.[29] In 1997 internal armed conflicts was introduced in the Swedish Aliens' Act, as a requisite for status as ' a person otherwise in need of protection'. In 2004 the European Council introduced the concept as a ground under the subsidiary protection regime of the Qualification Directive. Consequently, the concept of internal armed conflicts can be considered a vital part of European and Swedish migration law.

2.3 The Relationship Between International Humanitarian Law and Migration Law

The relationship between international humanitarian law and migration law is an issue that still leaves much untold. However, one could roughly divide the relation between them into three different aspects. Firstly, IHL and migration law could be seen as applying concurrently, when people in need of protection are caught up in armed conflicts, since these persons can be refugees and victims of conflict at the same time. Secondly, IHL and migration law can apply consecutively in situations when victims of conflict find themselves to be forced to leave the country of origin, because they do not receive adequate protection under IHL. The two fields of law in this case offer a continuum of protection. Finally, IHL may be seen as a source of inspiration for migration law, in the sense that the latter have imported concepts, principles or rules from the former on a standard- setting and/or interpretationary level. One example is a cardinal principle of IHL, the principle of distinction, which in refugee law imbues the concept of the exclusively civilian character of asylum.[30] Another example is the concept dealt with in this thesis; the concept of internal armed conflicts.

[28] UNCHR Handbook paras. 164-166
[29] *Cf.* Article 15 of the Qualification Directive
[30] S. Jaquemet, 'The Cross-fertilization of International Humanitarian Law and International Refugee Law', *International Review of the Red Cross*, (2001) Vol. 83, No. 843, pp. 651-674 at p. 652

3 The Concept of Internal Armed Conflicts de Lege Lata

3.1 Determination on the Existence of Conflicts

There is no international authority determining the nature of armed conflicts. Different bodies make determinations for different purposes and with different consequences.

Firstly, a decision of the Security Council on the existence of a threat to peace, breach of peace or act of aggression may be regarded as indirect evidence of an armed conflict. The decision is not on the existence of armed conflicts *per se*, however resolutions recalling respect for the Geneva Conventions has this implication, since the application of these require the existence of an armed conflict.[31]

Secondly, tribunals and courts, international as well as national, may have to make a determination on the nature of a conflict. For example, when individuals are tried for criminal responsibility of violations of international humanitarian laws, such assessments must be made.[32] In national courts the determination is of relevance *inter alia* for the application of subsidiary protection in migration law.

Thirdly, NGOs and international organizations may make such determinations in course of their work and activities. One such example is the ICRC. However, these findings are often non- public, only communicated with the parties involved, in order to remind them of their obligations under IHL.[33] Another example is academic projects like the Uppsala Conflict Data Project, which follows ongoing conflicts in the world and then defines and analyzes them for research purposes. The author does not suggest the findings of NGOs and research projects as authoritative. The organisations and projects are established with specific aims and agendas, influencing definitions and conclusions. One should therefore be careful when using or analysing these. Nonetheless, considering the invaluable insights and experiences these specialized bodies can offer, their conclusions may serve as guidelines.

Finally, the parties of the conflict themselves logically may decide on the nature of the situation they are in. Lacking any independent authority mak-

[31] 'Humanitarian Law, Human Rights and Refugee Law – Three Pillars' by the ICRC legal advisor Emanuela-Chiara Gillard, an official statement held at International Association of Refugee Law Judges world conference, Stockholm, 21-23 April 2005. Available at <www.icrc.org/Web/Eng/siteeng0.nsf/html/6T7G86>, visited on 2008-01-28
[32] *Ibid.*
[33] *Ibid.*

ing binding decisions in these matters, this is the most common way of determination of conflicts. This creates problems since it is rather unlikely that the parties to a conflict are either willing or even able to assess the situation objectively, and thus the application of IHL becomes discretionary.[34]

3.2 Concepts in International Law

3.2.1 Common Article 3 of the 1949 Geneva Conventions

Common article 3 of the 1949 Geneva Conventions was the first regulation of non- international armed conflicts in black letter law. Quite uniquely all states of the world have signed and ratified the conventions, thus conferring universal application of article 3.[35] Naturally, the Conventions largely codify international customary law. However, this is of poor significance in the interpretation of what constitutes an internal conflict, since article 3 define such conflicts only in the negative:

> "In the case of *armed conflict not of an international character* [my italics] occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions [. . .]"

Three separate criteria for application can be deduced from the wording: *ratione loci*, *ratione personae* and the existence of an armed conflict. The first criterion is rather simple, since the universal ratification of the 1949 Conventions leaves little territory escaping its application.

The second criterion is less clear. The wording 'each Party to the conflict' implies the existence of at least two distinguishable parties. It is widely accepted that non- governmental groups are required to meet some kind of organisational level to define as a party, since the ordinary meaning of a party calls for more than just random looters or rioters. General consensus seems to suggest that the group must be organised to such an extent that they are able to carry out the obligations under article 3. This is contended to imply organisation along military lines, including a structure of responsible command and an authority in control.[36]

The third criterion, the existence of an armed conflict, is the most complex one due to the fact that there still is not any acknowledged definition of the term. At the Conference preceding the adoption of article 3 a list with certain conditions to be fulfilled was suggested in order to clarify the meaning

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[34] L. Moir, *The Law of Internal Armed Conflict* (2002), p. 45
[35] ICRC, *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 21-Jan-2008*, <www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf>, visited on 2008-01-28
[36] L. Moir, *The Law of Internal Armed Conflict* (2002), p. 36

of ‘an armed conflict’. The list compromised *inter alia*, requirements of territorial control of the insurgents, recognition of belligerency and the involvement of regular armed forces. The list was abandoned and it is disputed whether it ever or at least nowadays can serve as anything else than examples of when an armed conflict occurs.[37] It seems like the list requires more than actually may be deduced from the wording of article 3, thus it is unlikely to be authoritative.[38]

The wording of common article 3 is vague and open to interpretation, failing to actually define its scope of application; an ‘armed conflict not of an international character’. This has proved to be counterproductive, since states in practice have shown themselves reluctant to apply the provision, trying to escape by simply denying the existence of an internal armed conflict in its wording.[39] The International Criminal Tribunals for the former Yugoslavia (ICTY) respective Rwanda (ICTR) have shed some light on its application in assessing the nature of these conflicts.

In *Prosecutor* v. *Tadić*[40] the Appeals Chamber of ICTY, in interpreting common article 3, held an armed conflict to exist:

> “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”[41]

Apparently, the Chamber set a rather low threshold for application. There are no requirements of governmental involvement, of exercise of territorial control by the insurgents or of recognition of belligerency. Thus, the Conference list mentioned above appears to be of no value.[42] The definition provided by the Appeals Chamber has been referred to as authoritative in succeeding cases decided by ICTY.[43]

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[37] L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 34-35; J.S Pictet, *The Geneva Conventions of 12 August 1949: Commentary 4, Convention Relative to the Protection of Civilian Persons in Time of War,* (Geneva: International Committee of the Red Cross, 1958), p.36

[38] *Cf.* article 32 of Vienna Convention on the Law adopted at Vienna, 22 May of Treaties 1969, 1155 U.N.T.S., p. 331. Preparatory works are in international law regarded only as a supplementary means of interpretation.

[39] L. Moir, *The Law of Internal Armed Conflict* (2002), p. 88

[40] *Prosecutor* v. *Dusko Tadić a/k/a “Dule”,* Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, 35 ILM 32 (1996). [hereinafter Tadić]

[41] Tadić para. 70

[42] L. Moir, *The Law of Internal Armed Conflict* (2002), p.43

[43] *See Prosecutor* v. *Dusko Tadić a/k/a “Dule”,* Case IT-94-1-T, Judgement of 7 May 1997, 36 ILM 908 (1997), at paras. 561-68; *Prosecutor* v. *Delalić, Mucić, Delić and Landzo*, Case IT-96-21-T, Judgement of 16 November 1998, at para. 183; *Prosecutor* v. *Furundzija*, Case IT-95-17/1-T, Judgement of 10 December 1998, 38 ILM 317 (1999), at para. 59

However, in a case decided by ICTR, *Prosecutor* v. *Akayesu*[44] the Conference list was given more importance. Based on these criteria the Chamber suggested a test of evaluation when determining the existence of an internal conflict. The level of intensity of the battles and the level of organisation of the parties, were determined as the main elements in distinguishing internal armed conflicts from mere disturbances.[45] The Chamber underlined that this test is not dependent on the subjective judgement of the parties, but should be based on objective criteria.[46]

Even though these statements by the Tribunals might offer some guidance on the interpretation of article 3 still, as noted by ICTR,

> "the definition of an armed conflict *per se* is termed in the abstract, and whether or not a situation can be described as an 'armed conflict', meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis"[47]

Article 3 applies *de facto*, that is as soon as the criteria are meet with no regard to how the parties themselves define the situation.[48] However, lacking any enforcing international body it is mainly in the hands of the parties to a conflict to determine the nature of it. Thus, the concept of internal armed conflicts as enshrined in article 3 is inevitably within the discretion of the parties to recognize it as such.[49]

3.2.2 Article 1 of the 1977 Additional Protocol II

The 1977 Additional Protocol II is the only international instrument dealing exclusively with non- international conflicts. It has been formally accepted by 163 states[50], but it is disputed whether all provisions have yet hardened into customary law[51]. The main drawback of the Protocol is that state prac-

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[44] *Prosecutor* v. *Jean- Paul Akayesu*, Case No. ICTR-96-4-T, Judgement of 2 September 1998, 37 ILM 13 99 (1998) [hereinafter Akayesu]
[45] Akayesu, paras. 619- 620
[46] *Ibid.*, paras. 603 and 624
[47] *Prosecutor* v. *George Rutaganda*, Case No. ICTR-96-3-T, Judgement of 6 December 1999, 39 ILM 557 (2000), at para. 93
[48] J.S Pictet, *The Geneva Conventions of 12 August 1949: Commentary 4, Convention Relative to the Protection of Civilian Persons in Time of War* (1958), p. 1353
[49] L.C. Green, *The Contemporary Law of Armed Conflict*, (Manchester: Manchester University Press, 2nd edition, 2000) p. 64; C.J Greenwood, *Essays on War in International Law,* (London: Cameron May, 2006) p. 125; L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 34 and 45,
[50] ICRC, *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 21-Jan-2008*, <www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf>, visited on 2008-01-28
[51] *See* for example C.J Greenwood, *Essays on War in International Law* (2006), pp. 198-199; and J-M Henckaerts, 'ICRC Study on Customary International Humanitarian Law' in *International Review of the Red Cross*, (2005) Vol. 87, No. 857, pp. 175-212. Either way, it seems like article 1 do not reflect customary law

tice offers little guidance because most states involved in internal conflicts since 1977, have not yet ratified the Protocol.[52]

According to the first passage of article 1, the Protocol is meant to develop and supplement article 3 of the 1949 Geneva Conventions. The scope of application is:

> "all armed conflicts /…/ which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[53]

It explicitly does not apply to wars of national liberation or situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.[54]

The wording of article 1 requires several elements for application. Firstly the conflict must involve governmental armed forces, and thus conflicts comprising only irregular forces or non- governmental groups fighting each other, are excluded. It is not clear what is meant by 'armed forces'; whether it entails just regular military entities, or also national guards, police forces and customs.[55] As under common article 3, there is at least a requirement of responsible command.[56]

Secondly, the opposing party must have *de facto* control of at least some part of the state territory. The control must be stable and extensive enough to allow the performance of sustained and concerted military operations; that is continuous and persistent acts in accordance with a strategic plan. Thus modern warfare, like guerrilla fighting and terrorism, implying frequent mobility and long-term but sporadic acts, are excluded. This criterion has been much criticized, since the implied required degree of intensity and

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[52] C.J Greenwood, *Essays on War in International Law* (2006), p. 203; L. Moir, *The Law of Internal Armed Conflict* (2002), p.120

[53] Article 1(1)

[54] Article 1(1) and 1(2). Wars of national liberation are defined as international conflicts, covered by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted at Geneva, 8 June 1977 1125 U.N.T.S., p. 3 [hereinafter Protocol I]. The implications of this will be dealt with in chapter 4.2.2

[55] The doctrine is somewhat divergent. Pilloud et al. argue that the term should be interpreted in the broadest sense, *see* Pilloud et al. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* (Geneva: International Committee of the Red Cross 1987), paras. 4460 and 4462). Moir on the other hand seem to suggest that only entities with military structures are included and support his conclusion with statements in the preparatory works, where several delegates opposed the inclusion of police forces. *See* L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 104-105

[56] L. Moir, *The Law of Internal Armed Conflict* (2002), p. 105

duration of the conflict suggests that only situations resembling international wars are included.[57]

The final criterion, that the opposing party must be able to implement the provisions of the Protocol (*inter alia* to care and search for wounded and sick) further supports this contention. In order to fulfil this requirement the opposing party must have established some kind of infrastructure. Consequently, the material application of the Protocol seems to be triggered only when the opposing force has established some kind of *de facto* government over some part of the state territory.[58]

In comparison with common article 3 of the 1949 Geneva Conventions, the Protocol gives a narrower and more restrictive definition of internal armed conflicts.[59] The definition is more concrete but provides for such conditions that only intense and large- scale conflicts are included.[60] Thus, many or most contemporary internal conflicts, including high mobility and guerrilla warfare, would fail to fulfil its requirements. [61]

This entails that the relationship of the Protocol to common article 3 becomes very important. If the former is meant to supersede the latter, then many (or most) conflicts would be left unregulated in international law. At the Diplomatic Conference preceding the adoption of the Protocol, many delegates contended that eventually common article 3 and the Protocol would converge, by state practice redefining the application of article 3 up to the threshold of the Protocol. However, to this date there is not much evidence supporting such a development in state practice.[62] Thus, a reasonable conclusion would be that common article 3 and Protocol II are intended to apply to different type of conflicts and thereby as operating complementary. Common article 3 ensures minimum protection in any non- international conflict, while Protocol II provides more extensive humanitarian rules in internal conflicts resembling international wars.[63]

3.2.3 Recent Developments in International Humanitar-

[57] L.C. Green, *The Contemporary Law of Armed Conflict* (2000), pp.66-67; L. Moir, *The Law of Internal Armed Conflict* (2002), p. 105-106
[58] L.C. Green, *The Contemporary Law of Armed Conflict* (2000), pp. 66-67 and 321; L. Moir, *The Law of Internal Armed Conflict* (2002), p. 106
[59] L. Moir, *The Law of Internal Armed Conflict* (2002), p.101; Pilloud et al. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), paras 4456-4457
[60] L.C. Green, *The Contemporary Law of Armed Conflict* (2000), pp.66-67; L. Moir, *The Law of Internal Armed Conflict* (2002), p.101
[61] L.C. Green, *The Contemporary Law of Armed Conflict* (2000), pp. 66-67; F. Kalshoven *Constraints on the Waging of War,* (Geneva: International Committee of the Red Cross, 1987), p. 138; L. Moir, *The Law of Internal Armed Conflict* (2002), p. 106
[62] L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 101- 103
[63] Pilloud et al. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), p. 1350, L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 101-103

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Since the end of the Cold War in 1989, IHL has undergone progressive developments.[64] One of these has been the assimilation of the law of non- international conflicts with the law of international conflicts; the historically sharp distinction between them has gradually faded.[65]

This trend began in the *Nicaragua*[66] judgement by the International Court of Justice (ICJ) and was consolidated in the *Tadić* decision by ICTY. In *Nicaragua* the ICJ held common article 3 as 'a minimum yardstick' applicable in any armed conflict.[67] Thus, the ICJ recognized that some fundamental rules of humanitarian law are applicable no matter what type of conflict is at hand.[68] In the *Tadić* decision the ICTY concluded that many rules previously applicable only in international conflicts, now have become customary rules applicable equally in internal conflicts. It seems like states have began to abandon their reluctance, pervading in 1949 and 1977, towards regulation of internal armed conflicts.[69] The ICTY noticed in *Tadić*: "[a] sovereignty-oriented approach has been gradually supplanted by a human-being- oriented approach."[70]

Thus, the reality of modern armed conflicts seems to have rendered the legal distinction between different kinds of armed conflicts as irrelevant.[71] Consequently, most humanitarian law treaties concluded since 1995 applies to international as well as internal conflicts.[72] However, it is still premature to conclude that the distinction between international and internal conflicts has vanished *per se*. It appears like IHL is heading in that direction, but state practice is still not sufficient or clear enough to confirm this trend as customary law.[73]

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[64] D. Schindler, 'International Humanitarian Law: Its Remarkable Development and its Persistent Violation', *Journal of the History of International Law*, (2003), Vol. 5 No. 2, pp. 165-188 at p. 174

[65] M.N Shaw, *International Law,* (Cambridge: Cambridge University Press, 5th edition, 2003), p. 1069; D. Schindler, 'International Humanitarian Law: Its Remarkable Development and its Persistent Violation' (2003), p. 176

[66] *Military and Paramilitary Activities in and against Nicaragua* (*Nicar. v. U.S.),* Judgement on 27 of June 1986, *ICJ Reports 1986*, at p. 392 [hereinafter Nicaragua]

[67] *Ibid.*, para. 218

[68] M.N Shaw, *International Law,* (Cambridge: Cambridge University Press, 5th edition, 2003), p. 1069; D. Schindler, 'International Humanitarian Law: Its Remarkable Development and its Persistent Violation' (2003), p. 176

[69] D. Schindler, 'International Humanitarian Law: Its Remarkable Development and its Persistent Violation' (2003), p. 177

[70] Tadić, para. 97

[71] *Ibid.*,, paras. 97-98

[72] *Inter alia* the Rome Statue of the International Criminal Court of July 1998. For an exhaustive enumeration, *see* D. Schindler, 'International Humanitarian Law: Its Remarkable Development and its Persistent Violation' (2003), p. 177 note 51

[73] *See* for example J. Kellenberger 'International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence', *International Review of the Red Cross,* (2003) Vol. 85, No. 851, pp. 645-653 at pp. 645-646

In the academic debate the gradation of different regulation for different conflicts has been pointed out as meaningless for decades.[74] The distinction begs difficult questions of origins, status and character of conflicts and participants. This is obvious from the jurisprudence of ICTY, trying to define the highly complex and inconstant situation in former Yugoslavia. It is argued that a uniform law of conflicts, independent of distinction between international and internal war would solve these intricate issues.[75]

It is not only the distinction between international and internal conflicts that is being criticised amongst international jurists, but furthermore the relevance of the traditional view on internal conflicts. The traditional view is based on the assumption that internal conflicts comprise armed forces, clearly distinguishable from civilians, under responsible command and skilled in conduct of hostilities. However, nowadays conflicts are mainly fought by private groups lacking any clear structure and training in the conduct of war. Thus, the black letter law appears anachronic. The greatest problem of IHL will thereby be to deal with the blurred concepts of contemporary conflicts and, in particular, the fading distinction of combatants and non- combatants.[76] This will be further dealt with in chapter 5.

3.3 Concepts in EU- law

The Qualification Directive seeks to harmonize the domestic complementary protection of the EU member states. Complementary or subsidiary protection includes all persons that do not fit within the legal definition of refugees, as enshrined in the Refugee Convention, but who nevertheless has a valid need of protection. Article 2(e) defines these persons as:

> "a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 /.../and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country"

Serious harm is in article 15 *inter alia* defined as:

> "(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

Paragraph (c) is meant to reflect the consistent but varied state practice of the member states, to grant some kind of complementary protections to per-

[74] E. Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts', *Leiden Journal of International Law* (2007) Vol. 20 No. 2, pp. 441-465 at p. 450

[75] E. Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts' (2007), p. 464

[76] D. Schindler, 'International Humanitarian Law: Its Remarkable Development and its Persistent Violation' (2003), p. 182

sons fleeing violations of human rights and other indiscriminate effects of armed conflicts, when a specific link to the Refugee Convention grounds is lacking.[77] The provision sets a rather high threshold since an *individual* threat is required.[78]

In the drafting of the paragraph it was suggested that a reference to the 1949 Geneva Convention III should be included. If this had been finalised, it would have been clear that only armed conflicts as defined in IHL would have been encompassed by the provision. Since the reference was abandoned in the final draft, the subsidiary protection in article 15(c) cannot be concluded to be linked solely to IHL.[79]

Partly article 15(c) reproduces the member states' obligations under the Temporary Protection Directive[80]. The latter is more generous in scope than the former, since it includes all armed conflicts and also systematic or generalized violations of human rights.[81] There seem to be a tacit recognition that protection is more easily obtained under the Temporary Protection Directive than under article 15(c). Hence, the individual continuously receive at least temporary protection for as long as it is valid, even though an application for asylum has been filed and denied. However, the regime of temporary protection is circumscribed by a built-in trigger mechanism: it only applies after a decision by the EU Council. Thus, its application can be (indirectly) controlled and restricted by the member states. The Qualification Directive on the other hand applies to anyone within the jurisdiction fulfilling the criteria for article 15.[82] This might explain the more cautious and restrictive wording in the latter.

The concept of internal armed conflicts lacks a common understanding across the member states. A recent UNHCR study of the impact of the Qualification Directive in five member states, shows that there are divergent interpretations and applications in for example France, Slovakia and Sweden. In Sweden the conflict in Chechnya was regarded as an internal armed conflict, while the Slovakian authorities did not recognize it as such. The situation of Iraq has been defined as an internal conflict by French authorities, while in Sweden only as a 'grave' conflict. UNHCR express concerns in their recommendations, that a restrictive approach in some member states

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[77] G.S Goodwin- Gill & J. McAdam, *The Refugee in International Law* (2007), pp. 326-327

[78] J. McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime', p. 481

[79] *Ibid.*, p. 485

[80] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal L 212 of 7 August 2001, pp. 12-33 [hereinafter Temporary Protection Directive]

[81] Article 2(c) of the Temporary Protection Directive

[82] G.S Goodwin- Gill & J. McAdam, *The Refugee in International Law* (2007), pp. 327-329; J. McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime', (2005), p. pp. 486- 487

can imply the denial of subsidiary protection to persons who indeed face a real risk of serious harm in their country of origin. The UNHCR consequently request for amendment of article 15(c), so that it is not limited to international and internal situations only.[83]

3.4 Concepts in the Swedish Aliens' Act

The Qualification Directive has not yet been formally transposed into the Swedish legislation. However, in 2004 a governmental inquiry (hereinafter the Inquiry) consisting of a group of experts in the field of migration, was assigned to review amendments necessary in order to transpose the Directive. In January 2006 the Inquiry presented a comprehensive report[84] with suggestions for legislative changes. Nonetheless, at the time of writing this thesis, no Governmental proposal has yet been finalized. Thus, the report from 2006 is the only document so far giving any guidance as how the Directive is going to be transposed into Swedish legislation.[85]

In line with the minimalist approach of the Inquiry's report,[86] the Inquiry concluded the existing provision in chapter 4 section 2 of the Swedish Aliens' Act to be sufficient enough to transpose article 15(c) of the Directive. However, for the sake of clarification and to safeguard the more favourable approach in the pre- existing provision, chapter 4 section 2 is suggested to be amended as[87]:

> "A person in need of alternative protection according to this law is an alien who /…/ is outside the country in which the alien is a citizen, but where there are reasonable grounds to assume that the alien upon return
> /…/
> 2. would as a civilian run a serious and individual risk to life or person by reason of indiscriminate violence in situations of international or internal armed conflict,
> 3. would otherwise be in need of protection due to international or internal armed conflict, or would risk to be exposed to serious violations due to other grave conflicts in the alien's home country, or
> /…/

[83] UN High Commissioner for Refugees, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007. Online. UNHCR Refworld, available at <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=473050632>, visited on 2008-01-28, at pp. 11-15

[84] *Skyddsgrundsdirektivet och Svensk Rätt. En Anpassning av Svensk Lagstiftning till EG-direktiv 2004/83/EG Angående Flyktingar och Andra Skyddsbehövande*, SOU 2006:6, 19 January 2007 (available with English summary at <www.regeringen.se/sb/d/108/a/56440>, visited on 2008-01-28)[hereinafter SOU 2006:6]

[85] G. Noll 'The Qualification Directive and its Transposition in Swedish Law' in Karin Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues and Implementation in Selected Member States*, (Nijmegen: Wolf Legal Publishers, 2007), pp. 79-86 at p. 80

[86] *Ibid.*, p. 80

[87] SOU 2006:6 pp. 164-165

and that alien is unable or, owing to such risk, unwilling to accord himself or herself of the protection of that country."[88]

The concept of armed conflicts is not elaborated by the Inquiry, but reference is made to statements in preceding preparatory works and case- law concerning the definition of subsidiary protection, as enshrined in current chapter 4 section 2 of the Aliens' Act. Thus, the transposition of article 15(c) is not intended to modify the existing application.[89]

Internal armed conflicts as a ground for subsidiary protection was introduced for the first time in the Aliens' Act in 1997. This aimed at codifying and clarifying already existing practice on giving protection to persons fleeing international and civil wars on humanitarian reasons.[90] During the first half of the 90s, people fleeing the conflicts in Somalia and Bosnia- Herzegovina were granted such 'humanitarian protection'. The decisive factors when determining the existence of an internal conflict were that no near solution to the conflict could be anticipated; that the general situation was such that the civilian population was not satisfactorily protected by the state from the battles; and that the circumstances was such so it would seem inhumane to send the person back.[91]

In the preparatory works of the provision introduced in 1997, the Government noted that at the time the incomparable largest category of persons granted resident permits on some kind of refugee related basis, were people fleeing war and civil war. The need for protection in these cases was held to be strong, at least temporary, since the armed conflict from where the persons concerned have fled could be so intense, that a return to that country appeared as unthinkable. This would especially be the case when the alternative of internal flight was inapplicable. It was concluded to be compelling reasons for introducing a new provision on protection, aiming at this category of persons.[92] The provision was, in content, identical to chapter 4 section 2 as quoted above. The preparatory works do not provide any further guidance on how internal armed conflicts are to be defined, nor does it refer to any relevant international instruments. This has instead to be sought in subsequent case- law.

The situation of Chechnya was in 2004 regarded as an internal armed conflict by the Government, in deciding upon an application for protection by

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[88] SOU 2006:6 p.44, in translation of G. Noll 'The Qualification Directive and its Transposition in Swedish Law' (2007), p. 82

[89] SOU 2006:6, p. 165

[90] Government proposal *Svensk Migrationspolitik i Globalt Perspektiv*, Prop. 1996/97:25, 20 September 1996 [hereinafter Prop. 1996/97:25], at pp. 99-100

[91] *See* Government proposal *Med Förslag till Utlänningslag m.m.*, Prop. 1988/89:86, 16 March 1989 at p. 147; case- law regarding Somalia: Reg. 25-93 (1993-06-21) and Reg. 26-93 (1993-06-21); case- law regarding Bosnia- Herzegovina: Reg. 11-94 (1994-03-17) and Reg. 13-94 (1994-03-17). All cases recited in H. Sandesjö & K. Björk *Utlänningsärdenden – Praxis: Utlänningsnämndens och Regeringens Beslut i Urval,* (Stockholm:Fritze 1995), pp. 569-572 and pp. 755-758

[92] Prop. 1996/97:25, pp. 99-100

two Chechnyan nationals[93]. In their grounds of decision, the Government stated that the situation of the civilians in Chechnya was uncertain and severe, since both the Russian army and the Chechnyan rebels were guilty of serious violations of human rights in the regions. However the applicants did not qualify as refugees, since a link to a specific refugee ground was lacking. In referring to internal armed conflicts as characterized in international law, such conflicts were concluded to comprise strives between a state's regular armed forces and other organized armed parties, which exceed situations of internal disturbances or sporadic or isolated acts of violence. The opposing armed party was considered to necessarily possess some kind of territorial control in the sense that they can perform military operations. The Government then argued that the application of the provision in the Aliens' Act could provide for both a more restrictive and a wider interpretation of internal armed conflict, than the one stipulated by international law. The decisive factors were concluded to be how intense the conflict is and thus to what extent the civilians are affected by it.

The criteria set in the case of Chechnya were reaffirmed by the Migration Court of Appeal in three cases[94] concerning the situation of Iraq in 2007, however with the opposite outcome. The Court considered the circumstances to be severe, but failing to meet the requirements of an internal armed conflict in the meaning of international law and chapter 4 section 2 of the Aliens' Act. The Court did not refer to any actual facts on the situation of Iraq, but simply stated that there currently exists no internal armed conflict.

3.5 Assessment and Conclusions

The Swedish concept of internal armed conflicts, as developed in case- law, refers to 'internal armed conflicts in the meaning of international law'. As is quite apparent from the above examination of the core instruments of IHL, this reference seems rather empty. One cannot conclude there to be any uniform or accepted definition of internal armed conflicts in international law. The definitions of common article 3, Additional Protocol II and relevant jurisprudence all suggest for different interpretations of the concept.

Common article 3 offers a wide ranging but vague definition. Neither territorial control nor the involvement by the Government seems to be required. Although the list of criteria mentioned in the preparatory works would delimit its scope, it is questionable whether this list could be considered as anything else than guidelines or examples of when internal conflicts are at hand. In contrast to common article 3, article 1(1) of Protocol II provide for a very narrow concept, requiring territorial control and a high level of organisation of the opposing party. Seemingly, only large- scale conflicts fall within its scope.

[93] Reg. 99-04 (2004-02-19)
[94] UM 23- 06 (2007-02-26), UM 1140- 06 (2007-05-23) and UM 837-06 (2007-06-15)

To this date we are lacking any relevant jurisprudence from ICJ on the definition of internal armed conflicts. Although the Tribunals of former Yugoslavia and Rwanda have shed some light on the issue, one should be somewhat careful in drawing conclusions upon these. These Tribunals were established in their each very specific context, with the primary aim to settle criminal responsibility of individuals. Either way, even though the Tribunals may have contributed greatly to the understanding of customary law and of the content of IHL, their conclusions upon determination of internal conflicts still leaves much untold.

In sum, it is evident from the examination of IHL that there exists no accepted or coherent understanding of the term internal armed conflict. As previously contended, this implies that the application of common article 3 and Protocol II in the end becomes dependent upon the will of the fighting parties to recognize the situation as an internal conflict. And because both the instruments allows for different interpretations, there is plenty of room for discretion.

Since migration law bases its concept of armed conflicts upon IHL, the incoherency and the built- in margin of discretion of the latter is passed on to the application of subsidiary protection. The ambiguous practice pertaining to the Qualification Directive reflects this well. As is apparent from the UNHCR study the interpretation of internal armed conflicts in the EU member states is divergent. This has several implications. One side of the coin, as UNHCR recognizes, is that the application of the Qualification Directive is unforeseeable and discretionary, and thus in danger of disregarding persons that indeed are in need of protection. The other side of the coin is the high stake gambling of 'asylum shopping'.[95] Naturally, people in flight will seek themselves to states with the most potential of granting protection. This is inevitably counterproductive, since liberal states most probably will restrict their policy collaterally as their welfare systems are strained. The changing policy of the Swedish authorities towards Iraqi asylum seekers *could* be indicating such an outcome.

It is in any case, as the previous examination has shown, far from evident what the Swedish interpretation of the concept of internal armed conflicts actually entails. It is clear that it is based on international law, but only implicit is one able to derive the source of law providing the base. Since territorial control and governmental involvement clearly are requirements, it appears as the Swedish interpretation resembles the definition of internal conflicts as laid down in Protocol II. Thus, a rather narrow approach is ap-

[95] This phenomenon is for example recognized in another UNHCR report, concerning asylum policies of the EU member states towards Iraqi applicants. *See* UNHCR, *Fortress Europe and the Iraqi 'intruders': Iraqi asylum-seekers and the EU, 2003-2007* by Markus Sperl, Research Paper No. 144 October 2007. Online: New Issues in Refugee Research, available from: <www.unhcr.org/doclist/research/3bbc18ed5.html>, visited on 2008-01-28

plied. These criteria have however been somewhat adapted to the elements of the law of migration.

The preparatory works mentions the fact that a conflict could be of such intensity that it would seem unthinkable to send the applicant concerned back to the country of origin, while the possibilities of internal flight are non- existent. From this rather vague statement at least a degree of intensity can be concluded to be required. The examination of the jurisprudence gives a somewhat scattered image of what this actually means.

In cases predating the introduction of the concept into the Aliens' Act, emphasis is on the general situation of the civilian population and on the fact that no near solution of the conflict is foreseeable. Since it was this case-law the provision introduced in 1997 aimed at codifying, one could presume that these criteria remain relevant. While the solution of the conflict is not mentioned by subsequent jurisprudence, the situation of the civilian population is confirmed by the Chechnyan and the Iraqi cases, thus undoubtedly an important factor.

However, there seem to be divergent approaches. In the Chechnyan case it is expressly stated that internal armed conflict in the Aliens' Act can be interpreted as either wider or narrower than in international law, and that the decisive factor must be how the civilian population is affected. Thus, it seems that the crucial element is the effect on the people of the country, rather than the fulfilment of criteria as laid down in Protocol II. In the Iraqi case this is somewhat altered. The Court considers that the situation of the civilian population *furthermore* is a decisive criterion. Hence, it appears as if the Court applies the criteria identical to the ones of Protocol II and the criterion of affected civilian population cumulatively. If this is the case, the concept of internal armed conflicts as defined in the Iraqi cases, is even narrower than Protocol II.

However, it might be precipitous to draw such a conclusion. In general it is hard to draw any conclusions at all regarding the interpretation of internal armed conflicts from the existing jurisprudence. As is striking when examining these cases, it is impossible to distinguish the actual circumstances which the Government/Court relies on in determining the status of respective conflicts. The specific situation of neither Chechnya nor Iraq is explicitly evaluated. Thus, one cannot really grasp the rationale behind determining Chechnya as an internal armed conflict, and Iraq as not.

In conclusion, the incoherency and built- in discretion identified in IHL seemingly infects the interpretation of internal conflicts when applied in migration law. What is rather remarkable is that this 'import' from IHL takes place without further deliberation. As regards the Swedish Aliens' Act, one cannot find any reflections, neither in preparatory works nor in case- law, upon the fact that the concept used is taken from a completely different sphere of law; the specific context in which the term of armed conflicts originally operates is simply ignored. Consequently the flaws of the

concept in IHL are unnoticeably transmitted when applying subsidiary protection. Furthermore, since it is not clear in concrete terms what distinguishes an internal armed conflict from other conflicts, the interpretation becomes discretionary. Subsidiary protection on this ground is hence, in the eyes of the applicant, legally uncertain.
Interestingly, if one takes into account the most recent developments in IHL and pertaining academic debate, IHL seems to be moving towards a uniform law of all armed conflicts. The differentiation between international and internal conflicts is already in decline, and furthermore the relevance of the classic notion of internal armed conflicts is being questioned. This is at least implicitly indicated by the wide interpretation of armed conflicts as presented in *Tadić*. Even though these developments so far are only true in style and not supported by state practice, it is interesting in comparison with the evolution of migration law. Because in the latter field of law, the development takes the opposite direction: distinctions of conflicts have become more and more consolidated. The Swedish Aliens' Act now deals with no less than three different concepts of conflicts: international, internal and other grave ones.[96] Thus, while distinctions of conflicts in IHL seem to be fading at the advantage of protection, they are becoming of increasingly importance in migration law as decisive factors for protection. Even though the notion of armed conflicts as used in migration law allegedly is to be based on the one of IHL, one can thereby predict a growing tension between these spheres of law. The fusion them between is in danger of turning into confusion.

While this is left to the future, let's take one step back and turn to the past, in order to find the origins of the failure in *lex lata* to coherently and adequately define internal armed conflicts. This takes us back to the early days of IHL.

[96] Chapter 4 section 2 point 2 of the Aliens' Act, SFS (2005:716)

4 Historical Regulation of Internal Armed Conflicts

The law of war arose from the customary regulation on the battlefield, as the combating parties applied equal status to each other. Hence, international law became an instrument of ensuring the same rights and obligations upon sovereign states when meeting arms against arms. Until the end of the 18th century the principle of state sovereignty prevailed, leaving any intra- state conflicts exclusively within the sphere of domestic law. However, in the work and theories of early international jurists, a new order emerged, introducing internal conflicts of a certain magnitude into the ambit of international law.[97] The historical process of this incorporation of domestic conflicts into international regulation stretches from the 18th century to the 1970s.

4.1 The Doctrine of Recognition of Belligerency

> "When a party is formed within the State which ceases to obey the sovereign and is strong enough to make a stand against him, or when a Republic is divided into two opposite factions, and both sides take up arms, there exists a civil war /.../ Although one of the two parties may have been wrong in breaking up the unity of the State and in resisting the lawful authority, still they are non the less divided in fact. /.../ That being so, it is perfectly clear that the established laws of war/.../should be observed on both sides in a civil war."[98]

In these words by the 18th century legal philosopher Vattel one can distinguish the birth of recognition of belligerency[99]; the doctrine that introduced the international regulation of internal armed conflicts. In practice this doctrine emerged in the beginning of the 19th century, during the conflicts in the Spanish- American colonies.[100]

The traditional international law then recognized three different stages of domestic armed challenges against the established authority of a state: rebellion, insurgency and belligerency.[101]

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[97] L. Moir, *The Law of Internal Armed Conflict* (2002), p. 3; L. Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts,* (Leiden: Martinus Nijhoff, 2006), p. 29

[98] E. de Vattel, *The Law of Nations or Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns*, translated by Charles G. Fenwick (Washington: Carnegie, 1916), p. 338

[99] F. Bugnion, 'Ius ad Bellum, Ius in Bello and Non- International Armed Conflicts' in H. Fischer (ed.), *Yearbook of International Humanitarian Law vol. VI,* (The Hague: T. M. C. Asser Press, 2003), pp. 167-198 at p. 15

[100] L. Moir, *The Law of Internal Armed Conflict* (2002), p. 6

[101] E. Luard, 'Civil Conflicts in Modern International Relations' (1972), p. 20; L. Moir, *The Law of Internal Armed Conflict* (2002), p. 4

Rebellions were small-scale or sporadic internal disorders. As long as these uprisings could be handled effectively within the domestic security system, they fell outside the ambit of international regulation. A more extensive attack, amounting to a real potential threat to the state government, was defined as insurgency. Then foreign states had to recognize the situation in order to protect and regulate affected political and economical interests, and furthermore to ensure humane conduct of combat. Recognising an insurgency did not trigger any belligerent rights but certain international rules, mainly in the sphere of maritime law. [102]

Belligerency was the final stage of internal conflicts, dependent upon the recognition by third state(s) or by the state under attack itself. Such recognition brought the entire *ius in bello* into effect, conferring equal belligerent rights and duties upon both the parties and furthermore activating the principle of neutrality upon third states.[103] Before any recognition was legitimate certain requirements had to be met. Firstly, the conflict needed to escalate from a mere local rebellion to a situation similar to an inter- state war, involving a considerable part of the population. Secondly, the rebels had to control and govern a substantial part of the national territory. Thirdly, the rebels had to become organised as armed forces under responsible command, observing the laws of war. Lastly, the conflict had to have reached such a stage that it became a diplomatically or economically necessity for foreign states to acknowledge it as a civil war.[104]

These rather imprecise and subjective criteria left the act of recognition within the total discretion of states. Since the parent state logically was reluctant to limit their sovereignty unless it gained their own interest, recognition rarely took place. Similarly, foreign states quite rarely made use of this option, as this could be considered as a hostile act against the legitimate government in the conflict.[105] Thus, while the above requirements opened the *possibility* of recognition of belligerency, state practice disaffirms that this was a duty in a legal sense. The impact of the doctrine of belligerency in the reality of international law was hence rather limited. While states seem to have accepted the fact that once recognition had taken place, the full panoply of *ius in bello* applied, the act of recognition itself rested on pure political or economical considerations, rather than on any legal obligation. Any humanitarian considerations therefore, were more of a fortunate consequence than the actual reason for applying the laws of war.[106]

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[102] L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 4-5
[103] E. Luard, 'Civil Conflicts in Modern International Relations' (1972), p. 20; L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 5 and 10
[104] E. Luard, 'Civil Conflicts in Modern International Relations' (1972); L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 13-14
[105] E. Luard, 'Civil Conflicts in Modern International Relations' (1972); L. Moir, *The Law of Internal Armed Conflict* (2002), p. 9
[106] E. Luard, 'Civil Conflicts in Modern International Relations' (1972), pp. 20-21; L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 17- 18

4.2 The Path of Common Article 3 and Additonal Protocol II

By the mid 19th century, in line with the then prevailing trend of codification, the laws of war were established in writing. Several international agreements and declarations were concluded (such as the Hague Conventions), but they all dealt with international wars only. Although the doctrine of recognition of belligerency rapidly became obsolete, internal conflicts were left unregulated, resting only on the willingness of states to apply relevant rules.[107] When civil war broke out in Russia and Spain in 1918 respectively 1936, the decline of recognizing belligerents became obvious: there was a persistent refusal of giving the belligerents any recognition, which resulted in a total disregard of the laws on war and disastrous humanitarian consequences.[108]

It appears as if the degeneration of the recognition of belligerency was simply ignored by states, appraising their sovereignty higher than humanitarian considerations in domestic conflicts. The further development of international humanitarian law thus lent upon the influence of another actor: the ICRC. Although having no competence adopting any legally binding rules, their work of codifying laws of war has had a tremendous effect upon IHL.[109] Already before First World War, the ICRC attempted to promote an international regulation of civil wars, but they met strong resistance amongst states, jealously guarding their domestic affairs from any interference. It was after the horrors of the Spanish Civil War that the ICRC finally managed to put the regulation of internal conflicts on the IHL agenda.[110] The drafting process of common article 3 of the 1949 Geneva Conventions began, but it was by no means an effortless process.

4.2.1 The Drafting of Common Article 3

No other issue was debated at such length as the content of article 3, in the preparatory conference preceding the adoption of the 1949 Geneva Conventions. From the start the delegates were divided into two different factions of opinion: those guarding state sovereignty and those favouring humanitarianism. The former group on the one hand, feared that a too wide or general formulation of the concept of non- international conflicts, would protect individual rights at the expense of the right of states to repress domestic violence. Several delegates were concerned that the article would include all types of internal unrest such as anarchy, rebellion and banditry, and thus

[107] L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 18-19
[108] F. Bugnion, 'Ius ad Bellum, Ius in Bello and Non- International Armed Conflicts' (2003), p. 18
[109] L. Moir, *The Law of Internal Armed Conflict* (2002), p. 21,
[110] L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 21-22; F. Bugnion, 'Ius ad Bellum, Ius in Bello and Non- International Armed Conflicts' (2003), p. 20

forcing governments recognizing belligerent status and applying the laws of war to even the smallest groups of rebels.

Those favouring humanitarianism on the other hand, supported the fact that common article 3 should confer as complete protection as possible, resembling the protection provided in international wars. These delegates furthermore suggested that what appears to be mere banditry, could be manifestations by groups fighting for independence and dignity, such as colonized people. They argued that a wide interpretation of non- international conflicts did not necessarily impair the right of the *de jure* government to repression, if the application of the rules would not impinge on the legal status of the belligerents.[111]

Several drafts trying to reconcile the two positions, comprising both formal and factual criteria, were presented but rejected. It appeared to be only two available solutions: either to apply all the provisions of the Geneva Conventions to a limited number of non- international conflict situations, or to apply a restricted number of humanitarian norms to all types of non- international conflicts.[112] A new draft was prepared based on the first alternative. Its application was dependent upon the formal requisite that the *de jure* government had recognized the opposing party as belligerents, or that the insurgents could be said to have the features of a belligerent force. This draft, as a number of subsequent ones, was strongly opposed.[113]

Finally in 1949 the draft corresponding to common article 3 as is stands today, was adopted by thirty-four votes against twelve, with one abstention. It appears to be based on the second alternative, in applying specific humanitarian rules to all non- international conflicts, and thus comprising a 'miniature convention' itself within the Geneva Conventions.[114] Crucial for the final adoption of the provision, was the introduction of a last passage stating: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict". This wording clearly confirms that application of article 3 does not constitute an act of recognition. In this way the guardians of sovereignty were assured that the provision would not in any way impair the rights of the *de jure* government.[115]

The final outcome of article 3 is clearly a compromise between the adherents to state sovereignty and those to a humanitarian approach. The words of the Swiss delegate illustrates this rather well: "half a loaf is better than no

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[111] L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 24- 27; J.S Pictet, *The Geneva Conventions of 12 August 1949: Commentary 4, Convention Relative to the Protection of Civilian Persons in Time of War* (1958), pp. 30-32

[112] F. Bugnion, 'Ius ad Bellum, Ius in Bello and Non- International Armed Conflicts' (2003), p. 22; L. Moir, *The Law of Internal Armed Conflict* (2002), p. 25

[113] L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 25-26

[114] F. Bugnion, 'Ius ad Bellum, Ius in Bello and Non- International Armed Conflicts' (2003), p. 23; L. Moir, *The Law of Internal Armed Conflict* (2002), p. 29,

[115] L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 27-28

bread."[116]. Notwithstanding the long process of drafting, it is important to acknowledge the fact that although disagreeing on the content, the states at least agreed upon the fact that protection were to be extended also to conflicts not of an international character. Thus the outcome should be seen as an act of consensus. [117]

4.2.2 The Drafting of Additional Protocol II

For many years, common article 3 was the only black letter law regulating internal armed conflicts. However, due to escalating numbers and intensity of internal conflicts in the context of decolonisation, the limitations of the minimum standard of the article became obvious.[118] Again, the ICRC took the initiative of gathering a conference to draft new rules. One aim was to adopt a more detailed definition of 'armed conflicts', based on objective criteria. Again, the drafting process was dogged with controversy with the delegates split into two groups of different opinions: state sovereignty on the one hand, and humanitarianism on the other.[119]

However, the drafting of Protocol II was further ironically enough haunted by the achievements of Protocol I, adopted at the same conference. While the overall goal of the ICRC with drafting new rules was solely humanitarian, several of the states participating in the conference came with a different agenda in mind. Their goal was to achieve legitimacy of armed resistance against colonial powers, and they suggested classification of conflicts according to the aim and objectives of the parties. Although the latter suggestion remains controversial, these states were successful, and struggle against "colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination"[120] was decided as international wars, within the scope of Additional Protocol I. Following this accomplishment many delegations interest in drafting another Protocol, dealing solely with internal armed conflicts, faded.[121] Consequently, the conference with the intended duration of one year, was prolonged for four years.

At the one extreme were delegates opposing any (further) regulation of non-international conflicts at all. At the other were states supporting the initiative that protection in international as well as internal conflicts should be

[116] Final Record Vol II-B, p. 335
[117] L. Moir, *The Law of Internal Armed Conflict* (2002), p. 29
[118] C.J Greenwood, *Essays on War in International Law* (2006), p. 204; L. Moir, *The Law of Internal Armed Conflict* (2002), p.89
[119] L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 91-92; L. Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (2006), p. 101
[120] Article 1(4) of Protocol I
[121] C.J Greenwood, *Essays on War in International Law* (2006), pp.205-206; L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 90- 91; L. Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (2006), pp. 101-102

provided by the same rules.[122] In comparison with the drafting of article 3, some new concerns were raised: that the adoption of Protocol II would internationalize internal problems and thus invite foreign interventions.[123] A long process of drafting proposals to be rejected began, which do not need to be dealt with in detail here.[124] The difficulties can be distinguished simply by looking at the outcome: a definition of internal conflicts that excludes the majority of such conflicts, adopted with a weak consensus. While common article 3 was approved with a large majority, Protocol II was accepted with 58 votes in favour, 5 against and the whole of 29 abstentions.[125] The drafting process and the outcome of the 1974-1977 conference has been summarised as an exercise in missed opportunities.[126]

4.3 Assessment and Conclusions

When one follows the development of the regulation of civil conflicts, from its birth through the doctrine of belligerency recognition to its formation *lex lata* as described in the previous chapter, one easily distinguishes a common denominator: states' jealous protection of their sovereignty. This is hardly of no surprise, but nevertheless, seems to be the main explanation to why internal armed conflict has been and still is a concept of non- consensus, within the sphere of IHL as well in the field of migration law.

Recognition of belligerency lent upon pure self- interest, either of the state under attack or of third states, thus barely on humanitarian considerations. The same amount of built- in discretion seem to have survived in the contemporary conceptions of internal conflict in IHL and migration law. Actually, in comparing the criteria of legitimate recognition of belligerency with the interpretation of an internal conflict under Swedish Aliens' legislation, one sees mainly similarities: territorial control, responsible command and a degree of intensity (large- scale).

In fact, the act of recognition of belligerency itself can be seen as equal to applying subsidiary protection. Because in a sense, when providing this protection the host state recognizes belligerency. And just as recognition of belligerency rarely took place because of economical and political considerations, this could be as true when states apply subsidiary protection. This since one should not underestimate the significance of the diplomatic relations between states, on which international peace as well as the globalized

[122] C.J Greenwood, *Essays on War in International Law* (2006), pp.205-206; L. Moir, *The Law of Internal Armed Conflict* (2002), pp. 92
[123] L. Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (2006), p. 103
[124] For a more comprehensive description *see* Moir (2002), pp. 91-99; Pilloud et al. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), p. 1325 *et seq*.
[125] C.J Greenwood, *Essays on War in International Law* (2006), p. 220; L. Moir, *The Law of Internal Armed Conflict* (2002), p. 94
[126] C.J Greenwood, *Essays on War in International Law* (2006), p. 220

economy leans upon. Like the recognition of belligerency, the application of subsidiary protection at least indirectly, implies recognition of a situation having turned from a matter of domestic affairs into an issue of international concern. The application of subsidiary protection on the ground of armed conflict thus becomes a crossing point, where the recognizing state is at risk of losing diplomatic flexibility. Declaring a situation as amounting to an internal conflict could be understood as hostile, interfering with interests of the *de jure* government or other third states. The diplomatic 'loss' is immediate concerning the parties involved in the conflict, but furthermore puts future international relationships in danger. From this view, the advantage of having an incoherent concept of armed conflicts, which invites different interpretations, is rather evident. The incoherency is meaningful and even desirable for states, in order to avoid a stable practice and being able to befriend several actors at the same time. The application of subsidiary protection is thereby intertwined with the diplomatic games played at the global arena. In situations where the international community with only few exceptions stands united, for example like in the conflict of Chechnya, the application of protection (the act of recognition) is rather safe. In contrary, in conflicts like the ones of Iraq and Somalia where the interpretations diverge significantly amongst states, the risks at stake are higher.

However, for all of this to be a valid contention within a Swedish context, one would have to prove that the judicial authorities are not independent from foreign policies. While this is not suggested to be ascertained within the frame of this thesis, the relevance of the argument is nonetheless persuasive.

To conclude, the historical regulation and development of the concept of internal conflicts is a story of compromising. It shows that states never have had any true will to finally define the limit between domestic affairs and international regulation. Thus, from a historical perspective the incoherency of the *lex lata* definitions of internal conflicts in IHL as well in migration law becomes rather self-evident and, in a sense, logic.

Seemingly, apart from now being black letter law, little has changed since the 18th century as regards the definition of armed conflicts itself. It is now time to look at the reality that this definition aims at regulating: the nature of conflicts from the 18th century up till today.

5 The Changing Face of Conflicts

5.1 From External Wars to Internal Conflicts

Until the end of 19th century most conflicts had been external wars. Civil wars and national unrests took place, but only to a limited extent in comparison with the contemporary occurrence. By the end of First World War, this ratio shifted and civil wars, revolutions and internal strives escalated. The reasons for this were several: the rise of new and unstable states, unemployment, inflation and the big depression, together paved the way for uprisings of varying degrees. Also sociological changes were triggering factors: an emerging well- educated working class and the expansion of socialistic and democratic ideas revealed the gross inequalities of the predominant order.[127] After Second World War the prevalence of internal conflicts became even more significant[128]. The development of nuclear weapons made the governments reluctant to take recourse to open wars, instead pursuing their ends with other methods. But most of all great ideological and political changes and the backwash of the decolonization, contributed to escalating internal unrest.[129]

The wars and conflicts of the 20th century have not only altered from mainly external to mostly internal; also the ways in which these are fought have changed. One, at least in the academic literature of the field of peace- and conflict research, has begun to speak about 'old' and 'new' wars. The old wars occurred in a world order of centralized, hierarchically ordered and territorialized states. The impact of global processes (the 'globalization') has turned this image into an anachronism.[130] The clear distinctions between public/private, state/non- state, civilians/military and politics/economics have blurred, making state interests only a nominal cause or goal of war. This is the pretext of the uprising of the new kinds of conflicts.[131] But before going into the details of this, a brief overview of the old wars is necessary.

[127] E. Luard, 'Civil Conflicts in Modern International Relations' (1972), pp. 7-9
[128] Interestingly enough this seems no to have been anticipated by the drafters of the UN Charter, since article 2(7) clearly reaffirms the traditional rights of state Sovereignty. *See* further in E. Luard, 'Civil Conflicts in Modern International Relations' (1972), p. 22 *et seq.*
[129] E. Luard, 'Civil Conflicts in Modern International Relations' (1972), p. 9 and pp. 11-14
[130] M. Kaldor, *New and Old Wars. Organized Violence in a Global Era,* (Cambridge: Polity Press, 2nd edition, 2006), p. 17
[131] *Ibid.*, pp. 21-22

5.2 The Old Wars

Wars in a traditional legal sense, compromising armed battles between two sovereign states, were naturally intertwined with the development of the modern state. The notion of war as a matter of state affairs was established firstly by the end of 18th century. In this era, the monarchs and rulers allocated state revenues to form standing armies with skilled soldiers, clearly distinguishable from civilians in wearing uniforms. The state's monopolization of the legitimate use of force was founded, simultaneously as the characterizing distinctions of the modern state emerged: distinctions between intra- and interstate, between state and non- state and between legitimate and illegitimate use of force. In particular, the distinction of war and peace became clear; armed violence turned into a limited and isolated event, an aberration, instead of a continuous element of the daily world order.[132]

While the wars of the 17th and 18th centuries were relatively limited in character, the revolutionary wars prevailed in the 19th century.[133] During this era the classic theories on warfare were developed[134], and the fundamental rules of *ius ad bello* and *ius in bello* were codified. [135]

The first half of the 20th century suffered two total wars, followed by the Cold War in the other half. It was in the two world wars that some of the elements of the new conflicts emerged. The indiscriminate bombings of civilians, argued as a military necessity, and the genocide of the Jewish community, were the first steps away from the previous clear distinction between the military and the civilian; the combatants and non- combatants. Notwithstanding this development the traditional legal notion of war, entailing clear distinctions, survived. Thus, even though the wars from the 17th century to the mid 20th century were fought somewhat differently, they were all alike in being directly associated with the territorialized and centralized state.[136] After 1945 new kinds of conflicts surfaced, involving other actors and techniques. But since they did not fit within the prevailing conception of war, they were overshadowed by the fear of another total war: the imagined (Cold) war.[137]

[132] M. Kaldor, *New and Old Wars. Organized Violence in a Global Era* (2006), pp. 17-20
[133] *Ibid.*, pp. 16-17
[134] Mainly by C. Von Clausewitz, writer of the classic piece *On War* (in translation by J.J Graham, London: N. Trübner, 1832)
[135] M. Kaldor, *New and Old Wars. Organized Violence in a Global Era* (2006), pp. 22 and 26
[136] *Ibid.*, pp. 16-17 and p. 27
[137] *Ibid.*, p. 32

5.3 The New Conflicts

5.3.1 A New War Economy

The economy of old wars was based on a centralized administration in order to increase the efficiency of the war and to boost the revenues paying for it. A great part of the population was mobilized to participate as soldiers or as producers of arms and supplies. The war effort was designed to maximize the ability to use force so as to overpower the enemy. The economy of the new contemporary wars is just about the total opposite. They are highly decentralized and fragmented in character. Only a minor part of the population is involved, due to lack of pay and often due to lack of legitimacy of the warring parties. Direct battles are uncommon; instead most violence is targeted against the civilians.[138] The statistics is painfully clear on this point: in the beginning of the 20th century about 85- 90 per cent of the victims were military, in Second World War the number lowered to 50 per cent and since the late 90s only 20 per cent of the loses have been military. The new conflicts vast impact on the civilian population is undeniable.[139]

5.3.2 New Kinds of Armies and Soldiers

The new conflicts comprise a diversity of fighting units: public as well as private, state as well and non- state and even mixtures in between. Visibly, the frequency of regular armed forces is in decline and violence is increasingly privatized. This is mainly due to incapability of governments to implement economical and political reforms, leaving the revenues of many states scarce. Soldiers can no longer expect training or regular pay, and thus have to seek other sources of financial support. This becomes the seedbed of down- breaking discipline and hierarchy. It is no longer regular armed forces that are exclusively the legitimate bearers of arms, but also private paramilitary groups, blurring the difference between the two. The latter often consists of autonomous groups of armed men, conjoined by a particular extremist political faction. Since these groups rarely wear uniforms, other than eventual distinctive signs, it is hard to clearly distinguish them from the civilian population. The differentiation of combatants and non- combatants is thus less obvious. [140]

The main difference between the armed forces of the old wars and the new ones is the type of organisation. In contrast even to guerrilla groups, the new forces are horizontal rather than vertical. They are both autonomous and cooperative at the same time, resembling the system of a spider wed. [141] An illustrative example of this is the parties operating in Iraq. They seem to consist of loose networks, mostly in the form of small cells, with varying

[138] M. Kaldor, *New and Old Wars. Organized Violence in a Global Era* (2006), p. 95
[139] *Ibid.*, p. 107
[140] *Ibid.*, pp. 97-99
[141] *Ibid.*, pp. 101-02

degrees of coordination. The actors are state as well as non- state in character and the cells are much decentralized: the individuals usually don't know the name of their leader nor the source for finance.[142]

5.3.3 A New Kind of Warfare

The new warfare bears similarities with revolutionary warfare (as developed by 'Che' Guevara) and manoeuvre theory. The warfare implies great mobility and the strategy of surprise. One avoids battles in order to spare men and equipment and rather work by gaining support within the enemy territory, to be able to operate from 'inside'. However, while revolutionary warfare was based on ideology, the new conflicts are based on 'labels' of identity, be they political, religious or ethnical. The main method of territorial control is thus displacement or even destruction, of persons with the wrong label.[143] The warfare aims at creating an unfavourable environment for the people the fighting party cannot or do not want to control. Hence, imposing continuous fear and insecurity and fuelling hatred of the 'other', are the instruments of control, rather than territory as such. Furthermore, since the conflicts are no longer financed by state revenues, assets are gained mostly through loot, robbery, extortion and pillage. Control of food and supplies is important, forcing civilians to sell their valuables for very low prices in order to survive.[144]

In sum, this gives that the new conflicts are characterized by systematic murders (like in Rwanda), by ethnical cleansing and forcible population expulsion (like in Bosnia- Herzegovina) and by intentional famine, destruction of homes and other actions rendering areas uninhabitable. In a sense, what used to be undesirable or illegitimate side effects in old wars, has become the method of fighting in new conflicts.[145] In addition, the blurred concepts of the new conflicts make it hard to actually tell even peace from war.[146]

5.4 Assessment and Conclusions

As concluded in the previous chapter, the legal definition of armed conflicts has changed insignificantly since the days of recognition of belligerency. When one contrasts this concept with the changing face of conflicts, the discrepancy between the law and the reality becomes obvious. The nature of conflicts has shifted rather radically during the last decades: it has evolved from external state wars to internal privatized violence. Wars in a classical sense, fought between distinguishable sovereign states are becoming rare. Unfortunately not because the world is more peaceful today, but because

[142] M. Kaldor, *New and Old Wars. Organized Violence in a Global Era* (2006), pp. 158-62
[143] *Ibid.*, pp. 103-05
[144] *Ibid.*, pp. 105-08
[145] *Ibid.*, pp. 105-06
[146] *Ibid.*, p. 117

they have been replaced by new kinds of conflicts: mostly internal with no clear lines between what is state and what is non- state; where there is a zone of peace and a zone of war; or who is a combatant and who is a civilian.

In order to protect the people affected by war and conflict, one would assume that the law is adapted to this new reality. But this is not the case. The warfare of new conflicts entails displacement or even destruction of persons with the wrong label. Some of these persons fall under the scope of the Refugee Convention, if an individualised persecution can be shown. However, the formal criteria of the refugee definition fail to embrace the indiscriminate character of armed conflicts. The regime of subsidiary protection aims at filling this shortcoming, but the legal concept of armed conflicts pertaining to it still does not reflect the reality. While the reality of conflicts is one of blurred concepts and distinctions, the law still relies on the assumption of territorialized conflicts fought along military lines. Although this made perfectly sense until the end of Second World War, this image didn't match the reality even in 1977, when the additional Protocols of the Geneva Conventions were adopted. It is quite clear that it was the most recent experiences that determined the outcome of these negotiations. The horrors of the wars on national liberation were successfully put under the scope of international wars, leaving the regulation of 'other' internal conflicts behind. Ironically enough, the peak of wars on liberation turned out to be reached about the same time. But the weak states rising upon liberation instead became scenes of new horrors. Sadly, the high threshold of the more extensive protection of Protocol II has resulted in many of these conflicts escaping its application.

Thus, the elements of the new conflicts are simply not caught within the stiff conception of armed conflicts in IHL and migration law. In particular two decisive factors are highly problematic: the limitation to conflicts involving governmental forces, and the requirement of territorial control by the opposing party. The criterion of involvement by a governmental army does not embrace the fact that the use of such forces are in decline; the violence of today is highly privatized, partly because scarce state revenues cannot provide for a standing army. This is not to say that governments are not involved in today's conflicts, but the states' monopoly on the legitimate use of force clearly seem to wane. Further, the requirement of territorial control is in total contradiction with how many contemporary internal conflicts are fought. Not only does the new warfare entail high mobility, but furthermore actual territorial control does not appear to be a primary goal of many insurgents. Instead of gaining control *per se*, the strategy rather seems to be to prevent anyone else from holding control. Targeting the civilian population *inter alia* by displacement or by infecting an area with constant horror is thus intrinsic to these types of conflicts.

With all this in mind, it is quite astonishing that one, 30 years later after the adoption of Protocol II, still put faith to this definition. And, even more peculiar, is the fact that it is this concept that founds the ground of the Swedish

subsidiary protection. Quite obviously, it is based upon an anachronic conception of internal conflicts.

In conclusion, by looking at conflicts in a historical perspective it becomes patently evident why the interpretation of internal armed conflicts in the Swedish Aliens' Act appears as inadequate: it simply ignores the challenge of the changing face of contemporary conflicts. When importing the definition of Protocol II, one has missed the opportunity to adapt the requisites to modern conflicts. Even though the effect upon the civilian population is of great concern, this is surpassed by the assessment of the formal criteria (territorial control, involvement by governmental forces etc) when determining on protection because of armed conflict. One could argue that this narrow approach is intentional in order to diminish refugee flows. However, if subsidiary protection is truly meant to provide protection to those fleeing the horrors of armed conflict, one cannot apply such an excluding and outdated interpretation of the term, that most contemporary conflicts fall outside. Because if this is the case, one would be compelled to question the relevance of having this ground for protection at all. Surely it is not surprising that states promise more in wording than what they intend to keep in action. However, given the development of conflicts as portrayed in this chapter, article 15(c) of the Qualification Directive, and the Swedish transposition of it, face a real risk of turning obsolete rapidly. Hardly this could have been intended to happen, only a few years after adoption.

With this rather distressing conclusion on the table, it is time to look at an alternative solution, as provided within the sphere of peace- and conflict research.

6 An Alternative Interpretation: the Definition by the Uppsala Conflict Data Project

There is a multitude of projects on conflict data collection, particularly within the field of peace- and conflict research. The field is diverse and complex, comprising a variety of definitions of armed conflicts. The definitions can be either quantitative (eg. focus on causalities) or qualitative (eg. focus on magnitude and duration of conflict). Depending on the subject of research, different kinds of definitions are suitable. In any event, the definitions or coding rules aim at simplifying the order of the world, to be able to analyse and understand it. Data collection projects thus provide researchers with data to develop academic theories or policy related arguments.[147] Importantly however, one should bear in mind that these data do not necessarily reflect the reality *per se*, but rather provide for estimations to be carefully interpreted in research.

6.1 Uppsala Conflict Data Project

UCDP is a research program of the Department of Peace- and Conflict Research at Uppsala University. The project has continuously collected data on ongoing armed conflicts in the world since the 1980's. Their purpose is to collect information on conflicts, providing a base for research studies on origins, dynamics and resolutions of conflicts.[148] The project uses a variety of sources comprising news agencies, newspapers, academic journals, research reports, international, national and non- governmental organisations and even documents of the warring parties. The sources are regularly scrutinised in order to maintain high reliability.[149] The definitions and data are used in various research projects around the world. For example, it is annually published in the report series *States in Armed Conflict* (Uppsala University), in *SIPRI Yearbook* (Stockholm International Peace Research Institute), and in *Journal of Peace Research* (Sage).[150]

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[147] T.B Seybolt (2002), 'Measuring Violence: An Introduction to Conflict Data Sets" in Stockholm International Peace Research Institute', *SIPRI Yearbook 2002: Armaments, Disarmament and International Security,* (New York: Oxford University Press, 2002), pp. 81-96 at pp. 81 and 96

[148] *Ibid*., p. 89

[149] L. Harbom, *States in Armed Conflict 2005,* (Uppsala: Department of Peace and Conflict Research, Uppsala University, 2006), pp. 101-102

[150] UCDP, *Conflict Data Collection*, <www.pcr.uu.se/research/UCDP/States_in_Armed_Conflict_Annual_Data_Eriksson1.htm>, visited on 2008-01-28

6.1.1 UCDP's Definition of Internal Armed Conflicts

UCDP defines internal armed conflicts as conflicts occurring between the government of a state and internal opposition groups. So called internationalized internal armed conflicts includes intervention of troops from other states.[151] The intensity ranges from a scale of minor (at least 25 but less than 1 000 deaths is a year) to war (more than 1 000 deaths in a year). [152]

The concept of armed conflicts comprises:

> "a contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths."[153]

Use of armed force is considered to be the use of arms to endorse one's position in the conflict, resulting in fatalities. Arms include any material means; manufactured weapons as well as sticks, stones, fire, water etc.[154]

A government is defined as a party controlling the capital of the state. This approach is chosen due to empirical studies, which show that governments *de facto* most often coincides with the party controlling the capital. This means that the government *de jure* is irrelevant. There is no requirement of a functional government, control over the capital is sufficient.[155]

Internal opposition groups comprise any non- governmental armed group with an announced name. The group has to be organized somehow, conducting planned political operations, rather than sporadic violence. The organisation must be of such a degree, that the group poses an actual threat to the governmental party. The group can either be an umbrella organisation, compromising several sub- groups, or an individual organisation. Whichever that can be determined to take the final political decisions and have the main responsibility of the military actions, is regarded as the warring party.[156]

The concept battle- related deaths entail fatalities directly related to the incompatibility. These include the military or organised armed groups, state institutions, state representatives as well as civilians. This means that causalities due to cross- fires or indiscriminate bombings are considered.[157] The number of 25 battle- related deaths as the lower threshold of an armed conflict, is not based on any empirical grounds. Rather this variable has been chosen to be able to grasp all kinds of conflicts: minor as well as major.[158]

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[151] L. Harbom, *States in Armed Conflict 2005* (2006), p. 25
[152] UCDP, *Definitions*, <www.pcr.uu.se/database/definitions_all.htm>, visited on 2008-01-28, keyword 'intensity level'
[153] *Ibid.,* keyword 'armed conflict'
[154] *Ibid.,* keyword 'armed force, use of'
[155] *Ibid.,* keyword 'government'
[156] *Ibid.,* keyword 'opposition organization'
[157] *Ibid.,* keyword 'battle- related deaths'
[158] Information from e-mail correspondence (conflictdatabase@pcr.uu.se), with Ralph Sundberg, researcher and (temporary) in charge of the database

6.1.2 Examples of Defined Conflicts

UCDP has charted all armed conflicts since the end of Second World War. As regards conflicts occurring after 1989, detailed information about each conflict can be obtained from the UCDP database.[159]

To give an illustration of how the UCDP definition works the conflicts relevant in the Swedish jurisprudence dealt with in this thesis will be rendered: Chechnya and Iraq.

The situation of Chechnya was considered an internal armed conflict amounting to war in 1995- 2001 and in 2004. In 2002-2003 and 2005- 2006 the situation was regarded as a minor internal armed conflict.[160]

As regards Iraq, the situation is defined as an internationalized internal armed conflict amounting to war since 2004. Battle- related deaths in the year of 2006 was estimated to a number of 3537 persons.[161] Concerning the year of 2007, an official definition of the situation will be available first in spring of 2008. However, according to information form UCDP[162], the situation in Iraq will undoubtedly be defined as an internal armed conflict involving the Government of Iraq. Most likely the conflict will amount to the intensity of war.

6.2 A Suitable Solution within Migration Law?

The UCDP provides for a well-defined and concrete definition of armed conflicts. It bears similarities with the concepts *lex lata*, as described in chapter 3. Equally to Protocol II and the Swedish interpretation, there is a requirement of a governmental party to the conflict. This criterion is well suited to the legal context of migration law. While this is not necessarily the case in IHL, there is a presumption in migration law that a person is in need of protection only if s/he is unable or unwilling, because of risk of harm/persecution, to avail him- or herself of protection of the state concerned.[163] It is usually only when the government itself is involved in the conflict, or is a passive bystander in an armed conflict between non- governmental groups, that this presumption is met.

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[159] Available at <www.pcr.uu.se/database/basicSearch.php>, visited on 2008-01-28
[160] UCDP, *Europe - Russia (Soviet Union) - General Information,* <www.pcr.uu.se/ database/conflictSummary.php?bcID=202>, visited on 2008-01-28
[161] UCDP, *Middle East - Iraq - General Information*, <www.pcr.uu.se/ database/conflictSummary.php?bcID=178>, visited on 2008-01-28
[162] Information from e-mail correspondence (conflictdatabase@pcr.uu.se), with Ralph Sundberg , researcher and (temporary) in charge of the database
[163] This criteria is stipulated with various wordings but same content by article 1 A(2) of the Refugee Convention, articles 2(c) and (e) of the Qualification Directive, and chapter 4 sections 1 and 2 of the Aliens' Act. *Cf.* quoted passages in chapter 3.

Similarly to the legal definitions there is a requirement of a certain degree of organization of the opposing party, allowing them to perform planned operations of armed violence. One strength of UCDP's definition is that it explicitly takes into account umbrella organizations, since this corresponds well to the structure of many contemporary warring parties. Even though the acts of individual organizations *per se* do not amount to more than sporadic acts of violence, this can still be regarded as an internal armed conflict if the acts can be derived from an alliance or an umbrella organization sharing the same political goal. Although this would not necessarily be excluded from the definitions in *lex lata*, the organizational level required seems to be along the lines of traditional military structures.

The main difference between the definition of UCDP and the legal ones is the requirement of 25 battle- related deaths. This is also its main weakness for several reasons, legal as well as non- legal. The term battle- related is problematic in terms of migration law since it includes both civilian and military fatalities. The purpose with subsidiary protection is *inter alia* to save those 'involuntarily' affected by conflicts. It does not necessarily concern the persons actually fighting. If many soldiers die, but leaving the civilians unaffected, the conflict is of scarce interest in the terms of migration policies.

Furthermore, having a numerical variable is problematic. Applying a fixed number can be misleading as regards the severity of the conflict. This is in simple terms illustrated by an example: a conflict occurring in India (population of 1 122 million) and a conflict occurring in Georgia (population of 4.4 million) taking 25 lives is hardly comparable. Another problem is that it is difficult to establish an acceptable number as a variable. The number of 25 is relatively low and the scope of application of subsidiary protection would thus be very extensive. For example, one could probably argue that governmental battles against drug cartels in some Latin American States, define as internal armed conflicts according to the UCDP definition. In the context of migration law, it would be difficult to contend that these conflicts should entail subsidiary protection.

The question is if it would be even possible to settle a number on any empirical or theoretical grounds, without facing puzzling moral dilemmas. One here touches upon an essential problem with the UCDP definition: while determining a numerical requisite in order to pursue academic research seems reasonable (you simply have to draw the line somewhere), this would be rather odd when dealing with legal protection of people in distress. One has to bear in mind that a conflict can be ever so severe upon the civilian population, without causing any actual deaths. Intolerable suffering in the form of run down food and water supplies or random torture and imprisonment is as much the reality of modern conflicts as definite death[164]. The human suffering in conflicts can hardly be reduced only to the number of fatalities.

[164] As have been shown in chapter 5.1

Thus, taking one step back, looking again at the reasoning I have just presented, one easily acknowledges the peculiarities in turning a conflict to a question of number of human lives taken, rather than human lives affected. The introduction of a definition of conflicts similar to the one provided by UCDP, would turn subsidiary protection into a question of mathematics. Introducing a numerical requirement, in any form, would probably have undesirable consequences for the process of protection determination. While the determination would be foreseeable and thus legally certain, it would be in danger of transforming the protection assessment according to the principle of an assembly line. The individual assessment of each and every case, a sacred principle of migration law, would then be endangered.

In conclusion, while the fusion of migration law and peace- and conflict research is interesting and may bear fruit as regards the understanding of conflicts, the exchange of definitions seems less suitable.

7 Summarizing Conclusions

The aim of this thesis was to approach the concept of internal armed conflicts in the Swedish Aliens' Act from three different perspectives, in order to grasp the full context of the term. How can the results of this be summarized?

The first perspective, the examination of *lex lata*, confirms my hypothesis that there exists no coherent or adequate definition of internal armed conflicts, neither in IHL nor in migration law. The Swedish Aliens' legislation operates the definition laid down in Protocol II, without due regard to its specific context and origin, and thus any shortcomings of the concept in IHL are simply passed on into the application of subsidiary protection. A built-in margin of discretion is identified in all examined concepts, which concerning the Swedish Aliens' Act is confirmed by an ambiguous case-law. The failure to clearly determine what an internal conflict is, leaves the ground of subsidiary protection unforeseeable and thus legally uncertain in the eyes of the applicant.

From a historical perspective the incoherency comes as no surprise, since the concept internal armed conflicts have always struggled from non- consensus. Actually, the view on internal conflicts is pretty much unchanged since the days of recognition of belligerency. Like the latter, the application of subsidiary protection is vulnerable to diplomatic considerations. When granting such protection to an applicant the host state actually implicitly recognizes, that the situation in the country of origin has turned from a pure domestic affair into an issue of international concern. Thus, the host state in a sense impinges on the sovereignty of the state in conflict, since it indicates that *ius in bello* has been triggered. In a world order where state sovereignty still is much appraised, and where economy and trade leans heavily upon friendly diplomatic relations, states avoid unwanted consequences by an ambiguous and unpredictable practice. From this point of view, the incoherent interpretations of internal armed conflicts appears logic, and in fact, desirable.

The fact that the legal conception of armed conflicts has been more or less static since the 18th century, implies an escalating discrepancy between the black letter law and the reality it aims at regulating. This because the nature of conflicts, how and why they are fought, have changed radically during the last century. While the understanding of internal conflicts, in both IHL and migration law relies on the assumption of clear distinctions between war and peace; military and civilian; warfare and criminality, the reality of conflicts reflects a complex face of blurred concepts. Quite obviously the law bases itself upon an anachronic conception of the nature of conflicts. Thus, the ground of subsidiary protection because of internal conflict appears almost as an illusion, since it only refers to what today define as exceptional situations. If these formal criteria of what constitutes a conflict

continue to surpass the evaluation of the effect upon the civilian population, article 15 (c) and chapter 4 section 2 of the Aliens' Act are rapidly turning obsolete.

In my final perspective I looked into the field of peace- and conflict research to see if an alternative and more suitable definition could be found there. While the UCDP provides for a very concrete and well defined concept, the variable of 25 battle related deaths is at odds with the context of migration law and policies. Although the examination of UCDP fails to offer any solution, it confirms a conclusion that seems to be valid for all my perspectives: that any concept of conflicts based on formal criteria is deceivable, and indeed, impermanent. Just as the concepts of IHL and migration law, the UCDP definition formalizes the assessment of protection to such an extent that the actual situation of the civilians involved is overshadowed. The correlation between the field migration of law and peace- and conflict research is nonetheless interesting. This discipline is more closely related to the reality of conflicts and thus better equipped to deal with these issues than the judicial one.

Having a concept of internal armed conflicts as a ground for protection appears to entail the infamous characteristics of catch 22. On the one hand, if the protection assessment is formalized one ensures predictability but at risk of narrowing the scope of protection. On the other hand, if the evaluation entails a larger margin of appreciation, there is a risk of discretion and the outcome becomes unforeseeable for the applicant. From this point of view, the current interpretation of internal armed conflicts in the Swedish Aliens' Act, seem to embrace the worst of the two: it is based on very formal requisites (article 1 of Protocol II) *and* gives room for discretion (the effect upon the civilian population). This approach puts heavy demands upon the shoulders of the entities that apply the law: the Migration Courts and the Swedish Migration Board. The question is whether these are competent enough or even able to deal with the complex issues attached to the evaluation of armed conflicts. The question is also whether the problems as identified in this thesis should be solved by changing the law, or by changing the authorities appointed to apply it. This will have to be answered by further research.

8 Final Remarks

In my opinion, finding a solution to the incoherent use of the term 'internal armed conflict' within the European context is of undeniable importance. The lack of a common understanding of article 15(c) in the Qualification Directive implicates a 'burden shifting' of states. The interpretation of conflicts becomes a tool of adjusting one's immigration policies, more than an actual legal assessment of protection. The example of the policies towards Iraqi asylum seekers in Europe during the last few years speaks its plain language. Undoubtedly, European states have benefited from Sweden's welcoming policy, since more than a third of this influx of Iraqis has gotten protection here. And surely it is tempting to conclude that the shifting Swedish policy in 2007, had as much to do with an overloaded asylum procedure, as to an approving humanitarian situation in Iraq.

As in many other issues when international and national law merge, a desirable solution would be the establishment of an autonomous international (or at least European) authority deciding in these matters. In an ideal global order, this competent, but politically independent body, could continuously determine the status of ongoing conflicts around the world. However, this scenario is nothing but a utopia. If not foolish, it would at least be naive to suggest that states would be willing to give up their sovereignty to such an extent. The political and economic interests at stake are simply too high and complex.

It appears like Sweden is caught in the dilemmas of state sovereignty. On the one hand we want, at least according to our government, to keep our tradition of liberal and comparatively hospitable immigration policy. On the other hand, this seems impossible without overloading the welfare system, as long as other states within Europe remain reluctant to share the 'burden'. And in a race between a friendly immigration policy and a system of guaranteed welfare, the former is the inevitable looser. Judging from the recent developments of the view on Iraqi and Somali asylum seekers, the race is already at full speed.

Supplement A – Legal Texts

Common article 3 of the 1949 Geneva Conventions:
In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 1 of Additional Protocol II:
1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Article 15 of the Qualification Directive:
Serious harm consists of:
(a) death penalty or execution; or
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Chapter 4 section 2 of the Aliens' Act (2005:716):

In this Act a 'person otherwise in need of protection' is an alien who in cases other than those referred to in Section 1 is outside the country of the alien's nationality, because he or she

1. feels a well-founded fear of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment,
2. needs protection because of external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses or
3. is unable to return to the country of origin because of an environmental disaster.

The corresponding applies to a stateless alien who is outside the country in which he or she has previously had his or her usual place of residence.

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